ed. There are, however, in this case further grounds. Counsel for Ronald Lee is right in saying that the liquidators are attempting to use this section in an improper way as a means of aiding them in other litigations. In my view Ronald Lee has assisted the liquidators within his capacity and within the bounds of professional privilege.

Therefore, in the exercise of my discretion in this case, I shall discharge the order made by the Asst. Registrar under section 249 in respect of Ronald Lee. The liquidators must pay to Ronald Lee his costs of this application.

Motion allowed.

Solicitors: *G. Raman & Co.; Shook Lin & Bok.*

A MALAYSIAN REPORTS

SYED IBRAHIM BIN SYED ABDUL RAHMAN v. LIEW SU CHIN (F)

[F.C. (Lee Hun Hoe C.J. (Borneo), Hashim Yeop A. Sani & Syed Agil Barakbah F.JJ.) September 26 & December 14, 1983]
[Kuala Lumpur – Federal Court Civil Appeal No. 102 of 1983]

Land Law – Sale of property – Memorandum of Transfer executed – Transfer not registered – Agreement to sell land to another person – Caveat entered by person agreeing to buy property – Application to remove caveat – Judgment given in default – Application to set aside – R.H.C. 1980, O. 32 – National Land Code, s. 327.

In this case one Lim the registered proprietor of a piece of land had sold it to the husband of the respondent. The purchase price had been paid and he had begun to erect a house on the land. The memorandum of transfer had been executed in favour of the respondent, but it had not been registered. Subsequently Lim agreed to sell the land to the appellant, who made part-payment for the purchase and lodged a caveat against the property. When the respondent applied for registration of the transfer to her, she was advised to have the caveat removed. She thereupon applied for the caveat to be removed. The appellant was served with the summons but failed to appear at the hearing. Wan Hamzah J. made an order directing removal of the caveat. The appellant sought to have the said order set aside on the ground that the order was obtained in his absence. This application was refused in the High Court. The appellant appealed.

Held: (1) the learned judge had complete discretion under Order 32 R.H.C. to set aside the order so long as the application was made before the order was perfected;

(2) in this case the learned Judge was justified in holding that the appellant knew of the respondent's prior interest. The evidence that the appellant had prior notice was overwhelming. Therefore the learned judge was correct in coming to the conclusion that the caveat should not be restored.

Cases referred to:

(1) *Evans* v. *Bartlam* [1937] A.C. 473.
(2) *Haroon bin Guriaman* v. *Nik Mah binte Nik Mat & Anor.* [1951] M.L.J. 209, 211.
(3) *Karuppiah Chettiar* v. *Subramaniam* [1971] 2 M.L.J. 116.
(4) *Temenggong Securities Ltd. & Anor.* v. *Registrar of Titles, Johore & Ors.* [1974] 2 M.L.J. 45.
(5) *Macon* v. *Goh Hooi Yin* [1976] 2 M.L.J. 53.
(6) *Eng Mee Yong & Ors* v. *V. Letchumanan* [1979] 2 M.L.J. 212.

FEDERAL COURT.

Wong Chong Wah for the appellant.

Sri Ram (*Teh Boon Eng* with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (read by Syed Agil Barakbah F.J.): Trouble emerged when Lim Guan Cheng the registered proprietor of a piece of land described as Lot No. 23 Mukim of Ulu Kelang ("the property") agreed to sell the property to two persons on different dates. On March 20, 1978 he entered into an agreement with Wong Vew Kong selling the property to Wong for $30,000.00 of which $15,000.00 was paid on execution of the agreement. The balance of $15,000.00 was paid on April 1, 1978. The Document of Title would seem to have been kept by his wife, the respondent. No caveat was entered on the property. Wong was in the building business. He started piling works on the house on the property in March, 1978. He appointed a sub-contractor in April, 1978. He purchased the building materials for the house himself as evidenced by numerous receipts and invoices for the purchases. By July 31, 1979 the main structure of the double-storey house had been completed. The roofing was substantially completed. On May 2, 1979 Wong nominated his wife, the respondent, as the transferee of the property. Pursuant to the nomination Lim executed a Memorandum of Transfer in Form 14A of the National Land Code, 1965 in respect of the property in favour of the respondent.

On July 31, 1979 Lim purported to agree orally to sell the property to the appellant. This sale was confirmed when Lim entered into an agreement dated March 13, 1980 with the appellant. The price was $130,000.00 of which $88,000.00 was paid on execution of the agreement. The balance of $42,000.00 was to be paid on the registration of the transfer. It seemed that the appellant had lodged a caveat before the written agreement was executed.

By a letter dated July 25, 1980 the respondent's then solicitors Megat Najmuddin, Leong & Co. had resubmitted an application to the Land Office, Gombak to obtain the State Authority's consent to a transfer of the property in her favour. An earlier application had been submitted when her late husband was the transferee. By a letter dated October 23, 1980 the respondent was asked by the Authority to attend an interview. Subsequently, the Land Office by a letter dated September 26, 1980 advised her to the effect that the caveat be removed before the transfer in her favour could be carried out. By two subsequent letters dated March 17, 1982 and April 1, 1982 she was advised that the State Authority had consented to the transfer of the property to her.

By an Originating Summons dated April 9, 1982 the respondent applied for the removal of the caveat. In support of her application she claimed in her affidavit that the purported sale to the appellant on July 31, 1979 took place well after the completion of the sale of the property to her late husband. She challenged the *bona fide* of the purported sale. She contended that she had prior claim to the property. It is her contention that at the time of the purported sale the vendor held the property as a bare trustee on her behalf. The appellant had wrongly and improperly entered a caveat on the property. Despite being served with the summons the appellant failed to appear at the hearing. As a result, Wan Hamzah, J. made an Order dated June 9, 1982 directing the removal of the caveat.

By a notice of motion dated June 29, 1982 the appellant sought to have the said Order set aside on the ground that the said Order was obtained in his absence. In his affidavit he affirmed as followed:—

"1. The Originating Summons dated on the 9th day of April, 1982, and the Affidavit affirmed by Liew Su Chin (f) on the 9th day of April, 1982 were served on me sometime in the middle of May, 1982.

2. I am an advocate & solicitor and run an office of my own. At the time the Originating Summons was served on me, I was extremely busy. I had to travel to Kuantan and Johore Bahru for my work. As a result I forgot that Originating Summons was fixed for hearing on the 9th day of June, 1982.

3. For the reason and under the circumstances aforesaid, I did not appear in Court on the 9th day of June, 1982."

He also affirmed under paragraph 8 of his affidavit that had he known that the respondent had an interest in the property he would not have bought the property.

According to the appellant before purchasing he made a search at the Land Office and found the property to be free from all charges and encumbrances. He stated that the respondent and her late husband had ample opportunity to lodge a caveat against the property but did not do so.

In her reply the respondent stated as follows:—

"4. The Defendant's allegation that he had no knowledge of my interest in the said land is completely and blatantly false. My husband passed away in May 1979. The two

storey house, which my late husband had proceeded to construct on the said land during his lifetime was then partially completed. Construction ceased temporarily with his demise. Mr. Lim Guan Cheng, the proprietor of the said land approached me sometime in July, 1979, the exact date of which I cannot now remember, with the proposition that I sell to the Defendant the said land together with the partially completed house.

5. Mr. Lim informed me that he had to try to obtain my agreement to sell the said land and partially completed house to the Defendant as he (Mr. Lim) owed the Defendant a favour.

6. Pursuant to my conversation with Mr. Lim, a meeting was held at the Defendant's office at or about 2 or 3 p.m. My brother Leaw Swee Ming and a family friend Eric Y.H. Wong accompanied me to the Defendant's office at 2nd Floor, Loke Yew Building, Jalan Belanda, Kuala Lumpur. Mr. Lim also attended the said meeting.

7. The Defendant offered to purchase from me the said land together with the partially completed house for M$140,000.00. I asked for M$160,000.00. The Defendant refused to increase his offer and negotiations ended thereafter. Mr. Eric Y.H. Wong spoke on my behalf to the Defendant at the said meeting."

Mr. Eric Y.H. Wong substantiated what the respondent said, for in his affidavit he swore under paragraph 4:—

"4. I hereby confirm that I was present at the meeting held at the Defendant's office at 2nd Floor, Loke Yew Building, Kuala Lumpur. In fact the Defendant spoke to me as representative of the Plaintiff's interest. The Defendant was aware of the sale of the said land by Lim Guan Cheng to the Plaintiff's late husband as at July 1979, if not earlier. I can also recall that while negotiating the purchase price with the Defendant, the Defendant had indicated that if agreement could be reached with Madam Liew for his purchase of the said land, he would want Madam Liew to cease construction works as he would like changes to the design of the house then under construction."

The respondent's brother, Leaw Swee Ming, also swore that he was present at the meeting and confirmed what was said at the meeting.

Appellant was served with the summons a month before the hearing. The learned Judge was not impressed by the explanation for his absence and the delay in his application. He referred to 0.35 r.2(2) of the Rules of the High Court, 1980 which says that an application must be made 7 days after the trial. We are doubtful about the applicability of 0.35 which deals with trial of an action. We think for summonses the proper Order is 0.32. There is no time limit under 0.32 r.5(3). The Judge has complete discretion to set aside the order so long as the application is made before the order is perfected. See also the *Supreme Court Practice* 1979, page 520 and *Evans* v. *Bartlam.*[1]

The learned Judge was also not impressed by the appellant's claim to prior right over the property merely by lodging a caveat. He stated quite rightly that where there are two competing equitable interests the general rule of equity is that the person whose equity attached to the property first will be entitled to priority over the others. Where the equities are equal and neither claimant has the legal estate the first in time prevails. However, the learned Judge believed the appellant knew of the respondent's prior interest. In his judgment at page 84 of the Appeal Record he stated:—

"... At the time when he purported to buy the land, the house on it had been partially completed by the respondent's husband before he died, who was the contractor. How could the applicant not have known then at that stage. Any prudent purchaser would have enquired and he would have come to know who the owner was. Further, according to the respondent after her husband's demise she was approached by the registered proprietor sometime in July 1979 to sell the land and the house to the applicant as he owed the latter a favour. A meeting was held in the applicant's office where negotiations took place between the parties, which however proved abortive, to sell the land. The applicant wanted to pay $140,000/- but she asked for $160,000/-. In his affidavit in reply the applicant did not deny that the meeting had taken place but alleged that it was after the signing of his agreement on March 13, with the registered proprietor and it was held because the respondent came to know that he had bought the land. But, in my view, that story could hardly be true because what was the point of her seeing him on what she already knew. She did not need to confirm the fact because the caveat speaks for itself what happened. Secondly, if the meeting was held as alleged by the applicant then why has he not said one word about what happened at the said meeting. The respondent has told her side of the story. He has not. Since he has chosen to remain silent we can rightly and safely infer that what the respondent said regarding what transpired must be true. In my view, the applicant's affidavit is self-rebuttal enough to merit anyone to say that a proper trial could no more accomplish what the affidavit had accomplished to demolish the applicant's case because it established clearly that the applicant had prior notice of the respondent's previous sale. In the event, I do not see that the applicant's caveat could properly be restored ..."

He cited *Haroon bin Guriaman* v. *Nik Mah binte Nik Mat & Another*[2] where Briggs, J. found that the land owner and a purported purchaser conspired to defeat the interest of another purchaser by lodging a caveat and held that the imposition of a caveat when the person imposing it had already knowledge of the impending equity would not necessarily improve his position. Reference may be made to the headnotes:—

"Where competing equities arise, their relative priority *inter se* at the moment before a caveat is imposed to protect either will be determined by the ordinary rules of

equity. If a caveat is then put on to protect that which has the lower priority according to such rules, it may be warned off by the person entitled to the higher priority."

The following passage from *Hogg* on Registration of Title to Land throughout the Empire, 1920 Edition was referred to:–

"Even if a caveat is valid, it will not be allowed to prevent registration of an interest admittedly prior to the caveator's interest and may therefore have to be removed altogether.

Although it has been said that a caveat 'operates as notice to all the world' of the equitable interest referred to in it, this opinion is contrary to actual decision, and the better view seems to be that the entry of the caveat merely serves as notice to persons searching the register, the precaution of searching being neglected at their own risk. The caveat, in fact, does not add to, but merely protects, existing rights."

The learned Judge rejected the contention of the appellant that he was entitled in law to have the caveat imposed. He cited the principle laid down in *Karuppiah Chettiar* v. *Subramaniam*[3] and followed *in Temenggong Securities Ltd & Anor.* v. *Registrar of Titles, Johore & Ors.*[4] that once the owner by a sale had wholly disposed of the land he divested himself of all interest therein and he becomes thereby merely a bare trustee for the purchaser. There was therefore no interest remaining against which a third party's caveat can lie. He distinguished *Macon* v. *Goh Hooi Yin*[5] from the case before him where the respondent had paid the full purchase price. But in *Macon's case*[5] the earlier of the two sales was not completed as only part payment was made. The later sale was completed by full payment of the purchase price. Also, there was a pending suit whereas there is none in the instant case. The question of notice on the part of the appellant becomes important as both sales were unregistered and subject to the approval of the State. On the evidence the learned Judge held that the appellant had notice of the earlier sale.

Various matters were raised before the learned Judge. No suit was ever filed by the appellant when he learned of the respondent's prior interest. Not even after the respondent's solicitors Messrs. Jagjit Singh & Co. wrote him a letter dated November 7, 1980 requesting him to remove the caveat before the respondent took appropriate action. Unless the caveat was removed the Pemungut Hasil Tanah would not effect the transfer. There was ample evidence before the learned Judge to enable him to decide the various issues before him, in particular the question of priority. In fact, he critically examined the evidence and came to the conclusion that the caveat should not be restored.

The appellant sought to have the caveat restored. He chose to be absent when the application to set aside the caveat came up for hearing. His only excuse was that as an advocate and solicitor he was busy and forgot about the hearing. The learned Judge touched on that and rightly took a serious view of the cavalier attitude of the appellant in absenting himself at the hearing.

The defendant did not deny about the meeting. But nowhere in his affidavit did he dispute the statement of Mr. Eric Y.H. Wong that he acted as the respondent's representative at the meeting and that the appellant was aware of the earlier sale by Lim to the respondent's late husband in July, 1979 or earlier. Neither did he challenge the evidence of Mr. Eric Y.H. Wong alleging that the appellant wanted the respondent to cease construction of the house if agreement could be reached as he wanted to change the design of the house under construction at the time. It offends credibility that the appellant should not challenge such evidence as he is seeking restoration of the caveat knowing fully well that the question of notice and priority had been raised before the learned Judge.

In *Eng Mee Yong & Ors.* v. *V. Letchumanan*[6] their Lordships in the Privy Council shunned the use of the expression "onus of proof" in relation to the applications for removal or extension of caveats as it is liable to lead to unnecessary confusion. The onus of the caveator, prompted by the analogy with interlocutory injunction, is that before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious in other words that the evidence before the court discloses a serious question to be tried. Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible. As Lord Diplock said in *Eng Mee Yong's case* at page 217:–

"... In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to

merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong ...".

In the circumstances is it just for the learned Judge to restore the caveat? The answer must depend on the facts and merits of each particular case. On payment of the full purchase price on April 1, 1978 the purchaser obtained the document of Title to the land from the vendor. By paragraph 9 of the affidavit the respondent stated that "the issue document of title to the said land has been and is presently in my possession." True no caveat was lodged. It may be that she thought that her interest was sufficiently protected by taking possession of the document of Title and also that her husband was then building the house on the land. Further, the registered proprietor had executed a Memorandum of Transfer as mentioned earlier. The evidence that the appellant had prior notice is overwhelming. We do not think the learned Judge was wrong to refuse restoring the caveat.

We see no reason in the instant case to interfere with the decision of the learned Judge. Accordingly, we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Sri Ram, Zulkifly & Kumar.*

BERTAM CONSOLIDATED RUBBER CO. LTD. v. COLLECTOR OF LAND REVENUE PROVINCE WELLESLEY

[F.C. (Salleh Abas C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah F.JJ.) June 22, 1983 and January 14, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 289 of 1982]

Land Law – Land Acquisition – Award of Collector of Land Revenue increased by Judge – Appeal – Respective functions of High Court and Federal Court relating to claims for compensation – Estate land subject to constraint in s. 214A of National Land Code – Failure to show that award of Judge represent a fair market value of land – National Land Code, s.214A

In this case part of the appellants' oil plam estate had been acquired for a public purpose. The Collector of Land Revenue valued the land at $12,600 per acre. The appellants objected to the award and on a reference to the High Court, Abdul Razak J. sitting with two assessors enhanced the Collector's award to $15,000 per acre. The appellants appealed.

Held: the appellants had failed to discharge the burden of showing that the increase in the award by the learned judge did not represent a fair market value of the scheduled land. Having regard to all the evidence, the Judge's valuation of $15,000 per acre was not inadequate or wrong in fact or law.

Case referred to:

(1) *Collector of Land Revenue* v. *Alagappa Chettiar* [1971] 1 M.L.J. 43, 44.

FEDERAL COURT.

N. Chandran for the appellants.

Mohamed Saari bin Yusoff, Legal Adviser, Penang, for the respondent.

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the Judgment of the Court): The scheduled land of which the market value is in dispute in this appeal was part of the appellants' oil palm estate near the township of Kepala Batas hereinafter referred to as "Bertam Estate"). The land acquired for the purpose of LPN complex was approximately 20 acres which was small in size compared to the 5,000 total acreage of Bertam Estate. The relevant date for determining the market value by virtue of Section 8 acquisition under the Land Acquisition Act, 1960 was June 19, 1980. Relying on Encik Fernandez' valuation report, the Collector of Land Revenue made an award of $12,600/- per acre both for Lot 2014 and Lot 185 – the two lots affected by the acquisition. The appellants objected to the award and referred it to the Penang High Court under section 38 of the Act. Abdul Razak, J. sitting with two Assessors enhanced the Collector's award to $15,000/- per acre. The appellants are, however, still dissatisfied with the enhanced award and before us it is contended that the compensation should have been increased to $20,000/- per acre, based on KEMAS Centre acquisition which had taken place about 9½ months prior to the present acquisition, also affecting Bertam Estate.

As to the facts, we wish only to recapitulate some of the main features particularly as to the difference in expert opinion between Encik Fernandez (D.W.1) for the respondent and Mr. Loh Soong Chew (P.W.1) for the appellants. The sub-